IN THE MATTER OF THE HUMAN RIGHTS CODE S.O. 1981, c.53 (as amended)

AND IN THE MATTER OF the complaint by Mr. Robert Broadley alleging discrimination in employment on the basis of age by The Steel Company of Canada, Inc. and The United Steelworkers of America, Local 1005

Board of Inquiry: Berend Hovius

Appearances: For the Ontario Human Rights Commission: Mr. A. D'Silva

For The United Steelworkers of America, Local 1005: Mr. B. Shell and Ms. M. Kelly

For The Steel Company of Canada, Inc.: Mr. P. Jarvis

Hearings: January 30, May 29, September 23, 26 and 27 1991 at Hamilton, Ontario.

DECISION

Introduction

These proceedings arose out of two complaints filed by Mr. Robert Broadley alleging that his right to equal treatment in employment without discrimination on the basis of age had been infringed by both The Steel Company of Canada (Stelco) and The United Steelworkers of America, Local 1005 (the union). Initially, the complaints were directed at two items covered in the collective agreement negotiated between the union and Stelco: extended vacations available to some employees who were 61 years of age and early retirement. However, the Commission only requested the Board of Inquiry to deal with that part of the complaints covering extended vacations. The Commission also combined the two complaints pursuant to s. 31(3) of the Code.

On January 7th, 1991 I was appointed by the Minister of Citizenship, the Hon. Elaine Ziemba, to act as a Board of Inquiry to hear and decide the matter. On January 30th, the hearing was commenced by conference call and the dates of May 8, 9, and 29 were chosen by agreement of the parties. In late April I was informed that the parties all agreed that a postponement of the hearing was desirable; in particular, it was considered prudent to cancel the hearing dates of May 8 and 9 so that the parties might have the benefit of an arbitrator's decision involving the interpretation of some provisions in the current Collective Agreement between the union and the company involved in the case. Accordingly, the hearing did not recommence until May 29. Evidence was heard on that date and on September 23. The only witness was the complainant. The parties presented their arguments on September 26 and 27.

When the complaint was filed against the union, it referred only to sections 5 and 8 of the Code. The Commission first mentioned this at the beginning of its closing statements and indicated that perhaps the complaint should also have referred to s.4. I permitted an amendment of the complaint to add this section and denied the union's request for an adjournment so that it could reassess its decision not to call evidence. As I explained orally at the hearing, the nature of the complaint against the union had been fully understood by all concerned throughout the proceedings and almost certainly for years before. It was clear that the complainant alleged that the union had discriminated against him in employment on the basis of age by being a party to the collective agreement which provided extended vacations for some employees who had reached 61 years of age. There is absolutely no doubt in my mind that the union fully

understood that this was the nature of the allegation against it.

In any event, an amendment may not have been necessary in the circumstances of this case. First, s.8 and s.38(1) of the Code suggest that a Board's jurisdiction is broad enough to deal with all possible infringements of the Code reasonably raised by the complaint. The real question then is not whether the complaint referred to the correct section of the Code, but whether the respondent was fully informed of the allegation, was not caught by surprise at the hearing, had sufficient notice to prepare its case, etc. Secondly, s.5 of the Code may itself be broad enough to encompass situations where a union has entered into a collective agreement containing a clause which infringes a member's rights under the Code. See Renaud v. Board of School Trustees, School District No. 23 (Central Okanagan)(1987), 8 C.H.R.R. D/669.

The Facts

Mr. Broadley was employed at Stelco from 1958 to 1989 in various positions. He was fairly active in the union. For two terms in the seventies, he was chief steward of the tin mill, the work area of about three hundred people. In 1981 he was an active participant in negotiations for a new collective agreement by serving as a union representative on the pensions and group insurance subcommittee.

In 1983, Mr. Broadley completed twenty-five years of service with the company. This was a significant achievement and was recognized by induction into the Quarter Century Club. At that time Mr. Broadley became concerned about a provision in the collective agreement which stipulated as follows (quoting from the Basic Agreement dated July 25th, 1985 which simply carried forward this language from the earlier agreement):

VACATIONS

11.01(a) An employee should be entitled to annual vacation with pay in accordance with the following schedule, on the basis of his /her service at July 1st in each year:

One(1) year of service but less than Five(5) years - Two(2) weeks.

Five(5) years of service but less than Nine(9) years - Three(3) weeks.

Nineteen(19) years of service but less than Twenty-five(25) years - Five(5) weeks.

Twenty-five(25) years of service but less than

Thirty(30) years - Six(6) weeks.

Thirty(30) years of service or more - Seven(7) weeks.

(b) An employee 61 years or more and with 25 years or more of service shall be entitled to an annual extended vacation with pay in addition to his/her regular vacation entitlement under 11.01(a) in accordance with the following schedule on the basis of his/her age and service at July 1st in each year:

Age 61 - 1 week
Age 62 - 2 weeks
Age 63 - 3 weeks
Age 64 - 4 weeks
Age 65 - 5 weeks

But for the fact that Mr. Broadley would not attain the age of sixty-one until the year 2000, he would have become eligible for additional vacation under clause (b) beginning in 1984.

A clause similar to clause 11.01(b) of the 1985 agreement was first introduced into the collective agreement of 1965 and was carried forward into all future collective agreements between the parties until 1990. Unfortunately, the parties were unable to locate any living member of the original negotiating committee. However, certain facts regarding the history of the clause were not disputed. The clause was first introduced into the collective agreement in 1965 as a result of a union proposal that the company provide an "extended pre-retirement vacation". This was the terminology used by both the union and the company to refer to the clause throughout its history. A key rationale put forward by the union when it first proposed the concept was that employees aged 61-65 should gradually prepare for their retirement by taking more time each year away from the workplace. It was thought that the extended pre-retirement vacation would soften the effect of an employee's eventual absence from the work force upon retirement. No evidence was presented to suggest that this rationale was not the key element in the development, acceptance and continuation of the concept of extended pre-retirement vacations by both respondents in this case. Of course, the clause putting the concept into effect also contained an element of reward for past service. An employee did not become eligible simply by reaching age 61. He or she also had to have at least twenty-five years service.

As mentioned earlier, Mr. Broadley became personally concerned by the clause providing for extended vacation when he realized that some of his fellow members of the Quarter Century Club were eligible while he was not. He testified that by 1984

he was talking to "work mates, stewards, company, junior level management, foremen, and general foremen" about it. He also indicated that during the negotiations in 1984 and 1987 he submitted handwritten, informal suggestions to the union negotiating committee. Specifically, he recalled listing his objections to the extended vacation clause and the clause stipulating that an employee had to be fifty-eight years old and have thirty years service before he or she could retire with full pension. Both of these clauses in the collective agreement of 1985 became the subject of his complaints to the Human Rights Commission in December, 1986. During this period his main concern and the focus of his representations to the union was the clause dealing with early retirement.

In the collective agreement of 1988 the clause dealing with retirement was altered to refer only to thirty years service. As a result, Mr. Broadley was able to retire in 1989. The clause dealing with extended pre-retirement vacations was not altered until the 1991 collective agreement was negotiated in 1990. The wording of Article 11.01(b) in this agreement reads:

> An employee with 30 or more years service shall be entitled to fifteen (15) weeks of extended vacation with pay in addition to his/her regular vacation entitlement under 11.01(a) prior to his/her retirement date, less any vacation entitlement taken under this provision.

Mr. Broadley's concerns and his complaints to the Human Rights Commission were undoubtedly influential in the recent negotiations. By this time both the union and the company knew that the Commission considered the predecessor clause to be an infringement of the Human Rights Code.

The Submissions by the Parties

The Commission argued that Mr. Broadley's right to equal treatment without discrimination on the basis of age was infringed when some employees were granted a benefit not available to him solely because of a difference in age. It submitted that both the company and the union were responsible for the infringement by initially agreeing to the extended pre-retirement vacation clause and then not taking the opportunity to amend it in future collective agreements. Therefore, it suggested that both respondents were jointly and severally liable for the monetary damages plus interest which should be awarded. Monetary damages were seen as appropriate because Mr. Broadley would have received a total of fifteen weeks holiday before his retirement in 1989 if the clause had not contained an age requirement. It was now too late to order the company to grant him vacation time and so he should be compensated with an amount of money equivalent to fifteen weeks vacation.

Stelco argued that the provision in the collective agreement dealing with pre-retirement extended vacation constituted a special program within the meaning of s.13(1) since it was designed to relieve the hardship faced by individuals as they entered retirement. Therefore, there had been no infringement of a right under Part 1. In the alternative, the company stated that the complainant should be precluded from bringing the complaint because he had been a party, through his agent the union, to an agreement to provide additional benefits to a select group. Moreover, it was alleged that he had full knowledge of the provision for many years before he attempted to have it changed. Mr. Jarvis, for Stelco, suggested that, if these facts did not preclude a claim under the Code, then they should be taken into account along with other circumstances in fashioning an appropriate remedy. As a result, the suggested remedy was a simple declaration that the clause governing extended pre-retirement vacation,as it existed from 1965-1990, violated the Code.

The union began by acknowledging that the clause providing for extended pre-retirement vacation in the collective agreement from 1965-1990 constituted direct age discrimination and so offended Part 1 of the Code. Although the union's position on this point did not change, Mr. Shell did indicate, after hearing Mr. Jarvis' submissions on s.13, that "there is a very serious matter to be dealt with with respect to the section 13 argument". Mr. Shell argued vigorously that the union should not be liable for any monetary damages that might be awarded.

The Issues:

These submissions raise four possible issues:

1. Did the extended pre-retirement vacation scheme in existence from 1965-1990 qualify as "a special program" for the purpose of s.13 of the Code?

2. Was the union as well as the company responsible for any infringement of Mr. Broadley's right to equal treatment in employment without discrimination on the basis of age?

3. Was Mr. Broadley precluded by his behaviour or the circumstances of the case from seeking redress under the Code?

4. If Mr. Broadley's right to equal treatment in employment without discrimination on the basis of age was infringed, what is the appropriate remedy?

Determination of the Issues:

1. Section 13:

The parties were agreed that the extended pre-retirement vacation provision in the collective agreement in effect at the time of Mr. Broadley's complaint differentiated between persons on the basis of age. It was also common ground that, unless section 13 of the Code applied, Mr. Broadley's right to equal treatment in employment without discrimination on the basis of age was infringed when some employees were granted a benefit not available to him solely because of a difference in age. A key issue is, therefore, whether section 13 applies.

Section 13 provides as follows:

13.--(1) A right under Part 1 is not infringed by the implementation of a special program designed to relieve hardship or economic disadvantage or to assist disadvantaged persons or groups to achieve or attempt to achieve equal opportunity or that is likely to contribute to the elimination of the infringement of rights under Part 1.

(2) The Commission may,

(a) upon its own initiative;

(b) upon application by a person seeking to implement a special program under the protection of subsection (1); or

(c) upon a complaint in respect of which the protection of subsection (1) is claimed,

inquire into the special program and, in the discretion of the Commission, may by order declare,

(d) that the special program, as defined in the order, does not satisfy the requirements of subsection (1); or

(e) that the special program as defined in the order, with such modifications, if any, as the Commission considers advisable, satisfies the requirements of subsection (1).

(3) A person aggrieved by the making of an order under subsection (2) may request the Commission to reconsider its order and section 36, with necessary modifications, applies.

(4) Subsection (1) does not apply to a special program where an order is made under clause (2)(d) or where an order is made under clause (2)(e) with modifications of the special program that are not implemented.

(5) Subsection (2) does not apply to a special program implemented by the Crown or an agency of the Crown.

The legislative history of this provision is described in detail in Roberts v. Ontario (Ministry of Health) (1989), 10 C.H.R.R. D/948 and will not be set out again here. It should be emphasized, however, that the Legislature expanded the scope of the provision considerably in 1981.

In the Roberts case, Professor Backhouse notes (at paragraph 45139) that Ontario has adopted a special programs provision which is substantially different from that in effect in other jurisdictions. She elaborates (paragraph 45139 and 45140):

> Although some of the same phrases are used, the statute adopts a four part, disjunctive standard. Special programs are those that are: 1) designed to relieve hardship; 2) designed to relieve economic disadvantage; 3) designed to assist disadvantaged persons or groups to achieve or attempt to achieve equal opportunity; 4) likely to contribute to the elimination of the infringement of rights under Part 1 of the Code.
>
> There is no restriction of the scope of affirmative action programs (to the field of education, services, or employment, for instance), as is found in several other jurisdictions. The objectives permitted within such programs are very wide, indeed as broad as any found elsewhere in Canada. Apart from the fourth standard, there is no apparent check on the "effectiveness" of the programs at all.

In this particular case, Stelco focused on the first of the four disjunctive standards set in s.13(1), stressing that the extended pre-retirement vacation provision in issue was "designed to relieve hardship". It is, therefore, instructive to review briefly the reasoning in Roberts which is particularly directed at this standard. The parties agreed that the Roberts decision is presently the leading authority on the interpretation of s.13, partly because it is the only case in which a Board of Inquiry has considered the section extensively and partly because the result reached was upheld by the Ontario Divisional Court in The Ontario Human Rights Commission v. Ontario (Ministry of Health)(1991), 14 C.H.R.R. D/1.

Regarding the term "designed", Professor Backhouse concluded (at paragraph 45159):

> The verb "design" is defined by the Concise Oxford Dictionary (6th ed. 1976) as "contrive, plan; purpose, intend". The focus here is an intention, rather than the actual achieving of a result. The test required is a subjective one, and the focus is to separate bona fide

motivations from colourable intentions.

She specifically rejected the suggestion that the word "designed" set up an objective test requiring the Board of Inquiry to pass judgement on the efficacy of the program.

Professor Backhouse next turned to the definition of "hardship". She stated (at paragraph 54160):

> Ms. Baker [counsel for the respondents], citing a wealth of dictionary definitions of "hardship", suggested that this term covered a range of problems stretching from something "more than mere inconvenience" through "adversity, suffering, or humiliation" to "extreme privation or difficulty". This is a useful working definition.

Finally, Professor Backhouse concluded that a program could satisfy the requirements of s.13 even if it did not benefit all disadvantaged groups equally or if it only attempted to relieve the hardship of some even if others might suffer a similar hardship.

Professor Backhouse summarized the role of a Board of Inquiry in assessing a claim that a program fell within s.13 as follows (at paragraphs 45169 and 45170):

> Clearly, beneficiaries of the affirmative action program must be suffering hardship or disadvantage. A board of inquiry can properly examine the evidence to ensure that such is the case. However, the legislation does not insist that the disadvantage [or hardship] experienced by such groups be "substantial", and I decline to read this restriction into the provision....
>
> This is not to suggest that there is no room for challenge to respondents who seek to shelter a program under s.13. The beneficiaries must be individuals who suffer hardship, economic disadvantage, or disadvantage generally. The respondents must show that their <u>bona fide</u> intent in designing the program is to relieve such hardship or disadvantage or to assist disadvantaged persons or groups of persons to achieve or attempt to achieve equal opportunity.

In the result, Professor Backhouse found that the Assistive Devises Program of the Ontario Ministry of Health was protected by s.13 even though the funding of visual aids under the program was restricted to persons 22 years of age and under. Although the program did not treat all visually impaired persons equally, it was designed to relieve hardship or disadvantage. As mentioned, this decision was upheld on appeal. The Ontario Divisional Court stated (at paragraphs 2 and 3):

> The only issue in this case is whether or not the program is

> a "special program" designed to relieve hardship or economic disadvantage. It is agreed that this program was developed and implemented in order to assist its beneficiaries to achieve greater equality of opportunity...
>
> In our view, the age limitation in the program is protected by s.13 and the appeal must be dismissed.

It is clear that the case at hand does not involve a meticulously designed, elaborate, detailed and carefully monitored special program such as that described in the Ontario Human Rights Commission's Guidelines on Special Programs (1990). Indeed, one would not expect otherwise given that the extended pre-retirement vacation provision first came into being in 1965. However, the fact that the provision might not have met all of the suggested standards in the Guidelines is not fatal to the company's argument. First, the Commission itself (in the Guidelines at p.3) "recognizes that not all special programs will meet these standards" and states (at p.3) that "the Commission will be flexible in determining whether a program constitutes a special program that would be protected by section 13(1)". In other words, the Commission acknowledges that the Guidelines do not articulate minimum standards but rather ideal ones which the Commission will simply take into account in assessing a program. Secondly, the Commission's Guidelines, even if they purported to set minimum standards, do not have the force of law. The legal standard for the evaluation of the extended pre-retirement vacation provision is set by s.13 of the Code and, as noted earlier, the parties agreed that the leading case on the interpretation of that section is Roberts.

As indicated in the summary of the facts earlier, it was not disputed that a key rationale put forward by the union when it first proposed the concept of extended pre-retirement vacation was that employees aged 61-65 should gradually prepare for their exit from the workforce by taking more time each year away from the workplace. It was thought that the extended pre-retirement vacation would soften the effect of an employee's retirement. This rationale was a key element in the development, acceptance and continuation of the concept by both respondents in this case. The parties to the collective agreement linked the benefit of extended vacations to the traditional retirement age of 65. They worked backwards from age 65 and determined that those employees with twenty-five years service should receive gradually increasing time away from work beginning at age 61. By the time the individual was 64 years old, he or she would be entitled to a total of eleven or twelve weeks away with pay. The individual could use this time to acquire or develop interests which would help fill the time after retirement or to develop job skills for other employment.

The hardship that the extended pre-retirement vacation provision was designed to alleviate was, therefore, the

difficulty that older workers often experience in the transition from full employment to full retirement. Movement from full-time work spanning decades of one's life to the complete absence of work is a major change which carries with it social, psychological and financial implications. While it is true that many employees look forward to retirement, the adjustment can be severe. This was recognized in the context of mandatory retirement by both La Forest J. (at 653, 659, and 662) and L'Heureux-Dubé J. (at 687) in McKinney v. University of Guelph (1990), 76 D.L.R. (4th) 545 (S.C.C.).

Accordingly, the extended pre-retirement vacation provision was, in the circumstances of this case, intended to alleviate the hardship of long-term employees who would at the normal retirement age of 65 have to adjust to a dramatic change in their lives. Although older workers under the age of 65 may not be disadvantaged compared to their more senior counterparts (see Wilson J. in Harrison v. University of British Columbia (1990), 77 D.L.R. (4th) 55 at 65-67 (S.C.C.), they are disadvantaged in comparison to younger workers in at least one respect. They must prepare to enter the world of the senior retiree. Moreover, the real benefits of the program would, it was hoped, be perceived by the senior employees once they retired. There is no question that senior retirees in Canada are viewed as disadvantaged and, therefore, entitled to a number of benefits and privileges (see Wilson J. in Harrison).

The Commission pointed out that the extended pre-retirement vacation provision did not apply to every senior employee who would face the transition from full employment to retirement. Indeed, as noted in the summary of the facts, the provisions in issue contained a requirement that the employee have at least twenty-five years service. Both the union and the employer obviously felt that limited resources should be used to alleviate the hardship faced by long-term employees and union members. As Roberts indicates, the mere fact that a program does not apply to all who face a particular hardship does not preclude a finding that s.13(1) applies.

For these reasons I conclude that, in the particular circumstances of this case, the extended pre-retirement vacation provision in the collective agreements in force between 1965-1990 at Stelco constituted "a special program designed to relieve hardship" within the meaning of s.13(1). As a result, Mr. Broadley's right to equal treatment in employment without discrimination on the basis of age was not infringed when he was denied a benefit available to employees 61 years old and over. His complaint against both Stelco and the union must, therefore, be dismissed.

Since I have concluded that the complaint should be dismissed on this ground, it is not necessary to address the

remaining issues in detail. Very briefly, if I had not concluded that s.13(1) applied, I would have held the union and the employer equally responsible for the infringement of Mr. Broadley's right to equal treatment in employment without discrimination on the basis of age. I would have apportioned any monetary damages which might have been awarded equally between the two respondents. Also, I would not have found that Mr. Broadley was precluded by his behaviour or the circumstances of the case from seeking redress under the Code.

October 25, 1991
London, ontario

B. Hovius

Berend Hovius